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workable even if illogical, that has shaped our society, our government and our law. The sovereign, whether the autocrat or the people, is always given to doing as he will or as he must; leaving to his ministers, jurists and philosophers the task, often much harder, of justifying what the sovereign has done. The constant pull of a desire for certainty and uniformity in one direction, and of justice and righteousness in the other, has made the law move in a path determined by a resultant of these factors. This is the motive power. One of the brakes is the conservatism of man, most extreme in the primitive type; but strong in the modern species. The other is the great mass of the law; worked out by generations of the best intellect that could be secured for the most intellectual of all tasks; too great for any man to grasp, to say nothing of rebuilding from fundamental principles.

But, after all, law is life; and, like all life, it is known by its effects while its essential nature defies analysis.

WILLIAM HERBERT PAGE

THE SUPREME COURT IN UNITED STATES HISTORY. By Charles Warren. Boston: Little Brown and Company. 1922. 3 vols: pp. xvi. 540; x, 551; x, 532.

Success is measured by comparing performance with promise; it is unfair to dwell on what might have been undertaken. The promise of this book is not modest; yet no history of the court's place in jurisprudence is attempted, nor any assessment of the jurial value of its decisions; much less an appraisal of its personnel, or a critique of ultimate value. It is a chronological statement of the Court's constitutional labors; with notes on its changing membership and environment, and the counsel who invited, if they did not guide, the more famous decisions. In the words of the preface, it is "not a law-book," but an effort to "correlate in the reader's mind" the work of each term "with the political events in the nation's history."

This promise is great enough: the result an admirable fulfillment for such readers as know the lesser landmarks in our political history. Those however who cannot promptly "correlate" *The Betsy* with Jeffersonian *Sans Culottism*, or *Ex parte Milligan* with The Knights of the Golden Circle, or a long line of early cases with a profound social aversion to wasting money in paying debts, especially to non-resident creditors, — would do well to read McMaster before attempting Warren. The work is novel in plan, most valuable in substance, and in manner excellent; avoiding alike the rose-colored glass of Carson and the poisoned dagger of Myers; while giving for the whole court much of the background so artistically conceived for Marshall by Beveridge.

Mr. Warren has acquired the merit, so hard for a lawyer, of holding no brief for any of the fire-makers to whom the Court gave fuel. From Genet through Burr to Debs, from the Embargo through Slavery to Reconstruction, he adduces contemporary comment from amazingly different sources; but rarely fails to leave the reader to draw his own conclusions. Political pamphlets and oratory, private letters often still unprinted, forgotten legal publications, and above all editorial writing in popular journals, have been dusted off and ranged around a court of imperturbable apparent calm. It is a picture interesting and impressive; but the most admiring observer will feel that the judges have maintained such impenetrable reticence concerning their inter-relations, that little is really known of their actual passions or even emotions.

Again, though the author mentions, barely mentions the cacophony of contemporaneous criticism; the reader who knows even our national mile-stones, acutely feels that this enormous volume of collated comment sounds a bit too shrill. We are told in detail of the howling of men like Giles, always inglorious but never mute; but we think at once of the men on the street, who have always done most of the voting, and none of the writing; and who in the long run keep or discard what they want,—including Courts. Page after page is like a phonograph record of bygone noises; interesting always, yet promptly productive of the thought that the most vocative noise makers from Bache and Pickering to Yancey and Stewart of Nevada are considerably more dead than the judges whom they vituperated.

Mr. Warren is wise in restraining the lawyer's instinct for inferences. He seldom writes Q.E.D., doubtless feeling as must every professional reader, how tenacious of life is a constitutional decision. Its tentacles seem to live forever, and discussion even of *Chisholm v. Georgia* and *The Bank Cases* is apt to develop differences previously unsuspected.

We have noted but three dogmatic conclusions. Mr. Warren is firm and frequent in declaring "states-rights" as much a "local issue" as General Hancock's tariff. Every state's "rights" have been strictly its own wishes, and assertion has depended wholly on whose ox was gored. He also proves several times over, that appointments by openly partisan Presidents never packed the Court; and he is sure that Taney inadvertently elected Lincoln. Of these the first and third are popularly deemed axioms, and the second would scarcely justify demonstration, were it not for the lamentable fecundity of the Callender family.

The author's source-books form an imposing library; yet an appreciative critic may regret the apparent omission of the minutes of the original Circuit Courts, which would go far to show that what became the Federalist heresy of asserting for the United States a right to invoke the common law for criminal remedies, was the nearly universal opinion of a generation of lawyers exclusively bred to that law. The nature of defences, as well as the frequency of prosecutions is the evidence. It was the political, not the legal eye that saw danger in an inference perfectly natural for men who identified the common law with the law of nature.

Because transactions since Waite's day are too recent for the true historical perspective, the background of gossip and comment which is the life of the book ceases with 1888; later decisions are well listed but not pictured and framed. The reason is a bad one, for contemporary talk and writing cannot change, and are much easier to collate for our time than for generations ago. The real reason for a right decision, is that we readers are so near the talk of our own time that it bores us.

That a Richmond editor in 1821 found the "very title of the case" (*Cohens v. Virginia*) "enough to stir one's blood," is amusing and instructive; so too is the half-century later fulmination of Bowen of The Independent, in demanding "two or three sincere and obstinate Radicals on the bench" of the Court, because the country "distrusts lawyers when it comes to questions of loyalty and human rights"; but we decline excitement over North Carolina's success in keeping children at labor, or Arizona's failure to prevent Mike Raich from cooking. Our grandchildren may be deeply interested. But Mr. Warren's successor will do more than well if he produces a story as human and accurate as this book.

Although no "law-book," these volumes undeniably concern the law; therefore no lawyer can be expected not to differ or dissent,—in spots. One may think, as we do, that the facts given for the *Slaughter House*

Cases are unintentionally unfair to the local authority; another that *Gelpcke v. Dubuque* was not denied nor affected by *New Orleans &c., v. Louisiana &c.*, 125 U. S. 18, nor even treated to that silent suppression not unknown in that Court; — and there are other legal statements, certainly debatable, but stated with certainty. These are not errors; merely illustrations of the difficulty of pleasing lawyers generally by popular statements of technical matters.

All treatment of what the "business" bar calls the Federal specialties (as though they were a "line of goods"), — i.e. admiralty, patents, trademarks, copyright and bankruptcy, is disclaimed; but mention if not comment is not avoided.

The admiralty has, to be sure, suggested political questions which never arrived; but to comment on prize without recognizing the dominance of Stowell, or on the instance side without considering the influence on Story, and through Story on the country of the Provincial Vice-Admiralty tradition; — is to leave Hamlet out of the play. The sole reference to patents is mention of *O'Reilly v. Morse* as "upholding" the basic telegraph patent, a curious citation without any reference to the annulment of Morse's famous eighth claim, the vital point which has ever since affected this doctrine of patentable invention, and which embittered the patentee for life.

Then too it is surely the zest of the chase which finds in *Jenners v. Peck*, 7 How. 612, a concession to states-rights. The case merely construed the Bankruptcy Act of 1841, assuming a power in Congress to annul liens by mesne process: something it has done in subsequent acts without objection.

It would have been better to keep away from these nonpolitical questions; they would not have been missed in a book so pleasantly unlike a law-book; which is usually repellant because (as has been said) it seems always to be made by and for middle class people of middle age. This book shows what people of every sort and age said about their own constitutional law, while it was in the making.

CHARLES M. HOUGH

A TEXT BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN. By W. W. Buckland, M. A., F. B. A., of the Inner Temple, Barrister at Law, Regius Professor of Civil Law in the University of Cambridge, Fellow of Gonville and Caius College. Cambridge: The University Press. 1921. pp. xiv, 756.

Almost a century elapsed before the text of Gaius thoroughly affected ideas formed on the basis of the Institutes and the Digest before the discovery of the earlier institutional book. For a long time there was a tendency to seek to fit the statements of Gaius into or to adjust them to preconceived notions and to antedate systematic ideas of the maturity of law and Byzantine academic systematizings and organizings of rules and prunings away of archaisms. More recently the rise of a new and more truly historical method, the development of better methods of criticism and study of interpolations and the bringing to bear of new materials outside of the *Corpus Iuris* have required further modification of received views. For many years Girard's Manuel has been the teacher's main reliance for this purpose. Professor Buckland has now given us a book no less indispensable to the teacher — a book that ought to supersede everything in English and